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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WEBB & CAREY, A.P.C.,

Plaintiff and Respondent,

v.

JAMES W. KEENAN et al.,

Defendants and Appellants.

D043775

(Super. Ct. No. GIC817390)

APPEAL from an order of the Superior Court of San Diego County, William R. Nevitt, Jr., Judge. Reversed and remanded with directions.

James W. Keenan and Judy M. Keenan (together the Keenans) appeal an order granting the motion of Webb & Carey, A.P.C. (Webb) for a preliminary injunction. The trial court's order enjoined the Keenans from withdrawing from their current attorney's client trust account any of the settlement proceeds obtained in their professional negligence action against their former bankruptcy counsel. The preliminary injunction was issued in connection with Webb's claim against the Keenans for imposition of a contractual lien for attorney fees on the settlement proceeds. On appeal, the Keenans contend the trial court erred by issuing the preliminary injunction order because: (1)

Webb's claimed contractual lien for attorney fees did not apply to those settlement proceeds; (2) Webb had an adequate remedy at law; (3) the injunction wrongly attaches assets exceeding Webb's claim for attorney fees; and (4) the comparative harm suffered by them from the injunction exceeds the harm Webb would suffer had the motion for injunction been denied.

Webb has filed a Request for Judicial Notice and Motion to Dismiss this appeal. It contends the trial court has issued a writ of attachment in its favor directing the levying officer to take possession of the same settlement funds subject to the preliminary injunction, the writ of attachment supersedes the preliminary injunction and the Keenans' appeal is therefore moot.

FACTUAL AND PROCEDURAL BACKGROUND

In 1989 the Keenans entered into a partnership agreement with Dorothy Satten to own and operate a hotel and restaurant known as the Bridge Motor Inn. In 1994 the Keenans filed a complaint against Satten, alleging she had fraudulently induced them to enter into the partnership. Satten filed a cross-complaint making similar allegations against the Keenans. In 1995 a judgment was entered in that action against the Keenans in favor of Satten in the amount of \$18,726,865.53 (Satten Judgment).

In 1996 James W. Keenan filed for bankruptcy. By that filing, the Keenans lost control of their estate, then allegedly valued in excess of \$25 million. The Keenans were denied counsel at the bankruptcy estate's expense and remained unrepresented for two years. Satten filed an action in the bankruptcy court to have the Satten Judgment declared nondischargeable. In 1997 the bankruptcy trustee of James W. Keenan's estate,

Ross Pyle (Trustee), entered into a settlement agreement with Satten pursuant to which Satten accepted a general unsecured claim of \$1.95 million in exchange for her assignment of the Satten Judgment to the bankruptcy estate. The bankruptcy court approved that settlement agreement.

In March 1998 (apparently after the Trustee liquidated eight estate assets), the Keenans retained Webb as their nonbankruptcy counsel to pursue their claim that the liquidation of those assets by the Trustee was fraudulently based on nondisclosures by the Trustee and Satten in settling Satten's claim arising out of the Satten Judgment. The Keenans soon began disputing Webb's fees. Webb and the Keenans agreed to submit their fee dispute to binding arbitration.

On June 23 the Keenans and Webb entered into a written fee agreement (Agreement) regarding certain future services to be provided to the Keenans by Webb.¹ The Agreement provided:

"1. Services to be rendered by [Webb]:

"[Webb] will further prosecute *your claims against Ross M. Pyle, Chapter 11 Trustee for the Estate of James W. Keenan, and Dorothy Satten*, for intentional and negligent misrepresentation, breach of fiduciary duty, interference with contract, breach of the covenant of good faith and fair dealing, declaratory relief, and an accounting, *arising out of the negotiation and execution of that settlement agreement between Ross M. Pyle, Chapter 11 Trustee for the Estate of James W. Keenan and Dorothy Satten*, in an action to be filed in the Superior Court for the State of California, County of San Diego, (hereinafter referred to as 'the Action'). This representation includes

¹ Although Webb and James W. Keenan signed the Agreement on that date, Judy M. Keenan apparently signed it on November 6.

the investigation, litigation, negotiation and settlement of *those claims*.

"*No other legal services are covered by this agreement. . . .*
[¶] . . . [¶]

"2. Costs, Expenses, and Attorneys' Fees: [¶] . . . [¶]

"[Webb] will be paid on an hourly fee basis. Since the [Keenans] are in need of legal services at a time when they cannot pay the [entirety] of [Webb's] customary and usual hourly fees as they are incurred due to the Bankruptcy Court proceedings in the Estate of James W. Keenan, USBC Case No. 96-00871 Bll, and [Webb] agree[s] to provide the *above-described services* upon the expectation of being fully paid in the future, the [Keenans] agree that they shall pay \$100.00 per hour for the legal services, until such time as a recovery is made on the *above referenced claims*, at which time the [Keenans] agree that they shall pay an additional \$250.00 per hour for the legal services rendered to that date from such recovery. In addition, [Webb is] hereby assigned 10% of the gross amount of any recovery in the prosecution of *your claims*. [¶] . . . [¶]

"Upon any recovery, through mediation, settlement, arbitration, trial or appeal, you will first pay all outstanding costs, if any, then you will pay the fee, and then you will receive the net recovery. *By executing this fee agreement, you agree that there is a lien on any recovery obtained in connection with your claims for the amount of the costs and attorneys' fees agreed to herein.* [¶] . . . [¶]

"*To the extent that you request [Webb] to perform any legal services not described herein, the compensation to be paid for any related matters that arise out of the attorney-client relationship, not covered by this fee agreement, shall be the subject of a separate agreement and shall not be affected by any payment to [Webb] under this fee agreement.*" (Italics added.)

On June 24 the Keenans filed an action against the Trustee and Satten, alleging causes of action for fraud and misrepresentation, breach of fiduciary duty, interference with prospective economic and contractual advantage, declaratory relief, and

accounting.² That action was subsequently removed from the San Diego County Superior Court to the bankruptcy court. The Trustee filed a motion for summary judgment, which Satten joined. In a December 9 memorandum decision, the bankruptcy court stated the "gist of the [Keenans'] action is that the Trustee settled the Satten matter in a manner which injured the estate for the purpose of forcing a liquidation and lining the Trustee's pockets with the statutory fees which flow from such liquidation and disbursement." The bankruptcy court found no evidence to support the Keenans' allegations and granted the summary judgment motion on all causes of action alleged by the Keenans.

On or about July 21 the Keenans filed, in propria persona, a professional negligence complaint (drafted by Webb) against Jeffrey Gardner and the law firm of Saxon, Barry, Gardner & Kincannon (together Gardner) in San Diego County Superior Court Case No. 722857.³ Thereafter, Webb specially appeared before the court on the Keenans' behalf to prevent the expiration of the statute of limitations on their claims against Gardner and also negotiated the Trustee's abandonment of any claim to the proceeds of their claims against Gardner.

On March 12, 2001, Webb withdrew from representing the Keenans after Satten filed an action against Webb and the Keenans for malicious prosecution.

² Webb apparently prepared and filed the complaint in that action.

³ Gardner was James W. Keenan's former bankruptcy counsel.

Between March 23, 1998, and April 12, 2001, Webb performed 2,716 hours of professional services for the Keenans on all matters, including prosecution of their claims against the Trustee and Satten and their claims against Gardner. However, the Keenans did not pay the billing statements for Webb's services.

On April 11, 2001, Webb filed a notice of a contractual lien for attorney fees and costs in the Keenans' action against Gardner.

On April 18, 2003, Webb was informed the Keenans' action against Gardner had been settled. Also on that date, Webb gave written notice of its claimed contractual lien on the Gardner settlement proceeds to Gardner's counsel and to Hurst & Hurst (Hurst), the Keenans' new counsel. On May 13 the court approved the settlement and ordered the settlement funds be deposited in Hurst's client trust account pending further court order or agreement among Hurst, the Keenans and Webb. On August 26 and August 28 Webb gave additional written notices of its claimed contractual lien on the Gardner settlement proceeds to Gardner's counsel and Hurst.

On August 29 Gardner's counsel informed Webb the settlement proceeds from the Keenans' action against Gardner had been deposited into Hurst's client trust account.

On September 5 Webb filed an application with the San Diego County Bar Association for binding arbitration of its fee dispute with the Keenans.⁴ Webb

⁴ In 2001 Webb had filed a prior demand for binding arbitration with "J.A.M.S." pursuant to a written fee agreement. However, after the trial court confirmed the arbitrator's award resulting from that arbitration proceeding, in August 2003 the court apparently granted the Keenans' subsequent motion to vacate its judgment confirming that award.

apparently is seeking \$874,310.92 for the reasonable value of its services and prejudgment interest.

On September 8 Webb filed the instant complaint against the Keenans and other defendants, alleging causes of action for: (1) quantum meruit; (2) indemnity; (3) contribution; (4) declaratory relief; (5) interference with prospective economic advantage; (6) constructive trust; and (7) declaratory relief, temporary restraining order, and preliminary injunction. The seventh cause of action alleged Webb has a contractual lien (apparently pursuant to the Agreement) for its attorney fees and costs against the proceeds from the settlement of the Keenans' action against Gardner.

On September 26 Webb filed an application for a temporary restraining order and preliminary injunction to prevent further dissipation of the proceeds of the Gardner settlement until the amount and validity of Webb's contractual lien is determined.⁵

On October 10 Webb filed the instant motion for a preliminary injunction to prevent the Keenans from withdrawing any of the Gardner settlement proceeds from Hurst's client trust account until the amount and validity of Webb's contractual lien is determined in the instant action. Webb's motion alleged there is a substantial likelihood of immediate, continuing and irreparable injury to Webb if the Keenans are not preliminarily enjoined; Webb will probably prevail on the merits of its claims for attorney fees and costs; and the balance of hardships is in favor of Webb if a preliminary

⁵ The record on appeal does not show whether the trial court expressly decided Webb's application. The court may have considered Webb's application to have been superseded by its subsequent motion for a preliminary injunction, filed on October 10.

injunction is not issued. Webb argued that pursuant to the Agreement it has a contractual lien on the Keenans' settlement proceeds from their professional negligence action against Gardner.

The Keenans opposed Webb's motion for a preliminary injunction, arguing, *inter alia*, Webb's contractual lien pursuant to the Agreement did not apply to recovery on *all* of the Keenans' claims, including claims against Gardner, but applied only to recovery on their claims against the Trustee and Satten arising out of the negotiation and execution of the settlement agreement regarding Satten's claims. The Keenans argued the plain language of Webb's contractual lien did not apply to the proceeds of the Gardner settlement.⁶

On December 30 the trial court issued its order granting Webb's motion for a preliminary injunction, stating:

"Based on the evidence and argument submitted by [Webb] and the Keenans, the Court finds that there is a reasonable possibility [Webb] will prevail on the merits of its seventh cause of action at trial and the balancing of hardships favors [Webb]. The Keenans have not shown that [Webb] has an adequate remedy at law.

"The Keenans are enjoined from withdrawing any of the settlement proceeds in Keenan v. Gardner (GIC 722587) from the [Hurst] Client Trust Account until such time as the amount and validity of [Webb's] contractual lien for attorneys' fees and costs upon said proceeds is finally determined in this action."⁷

⁶ The Keenans also filed a demurrer to Webb's complaint.

⁷ The trial court also overruled the Keenans' demurrer to Webb's complaint.

The Keenans timely filed a notice of appeal.⁸

Pending this appeal of the order issuing a preliminary injunction prohibiting the Keenans from withdrawing their Gardner settlement funds from the Hurst client trust account, Webb obtained a writ of attachment directing the levying officer to attach "[t]he remaining amount of the approximately \$498,000 Gardner settlement proceeds on deposit for the benefit of [Keenans] in the Hurst & Hurst Client Trust Account."⁹

DISCUSSION

I

Preliminary Injunctions Generally

Code of Civil Procedure section 526 empowers a trial court to issue a preliminary injunction.¹⁰ (*Remillard Brick Co. v. Dandini* (1941) 47 Cal.App.2d 63, 66-67.) The

⁸ An appeal may be taken from an order granting an injunction. (Code Civ. Proc., § 904.1, subd. (a)(6).)

⁹ On January 11, 2005, Webb filed in this court a Request for Judicial Notice that included a copy of the December 17, 2004 writ of attachment. The Request for Judicial Notice is granted.

¹⁰ Code of Civil Procedure section 526 provides an injunction may be issued in the following cases:

"(1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.

"(2) When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action.

"(3) When it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the

general purpose of a preliminary injunction is to preserve the status quo pending a determination on the merits of the action. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.)

"In deciding whether to issue a preliminary injunction, a [trial] court must weigh two 'interrelated' factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from the issuance or nonissuance of the injunction. [Citation.]" (*Butt v. State of California* (1992) 4 Cal.4th 668, 677-678.) "A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim. [Citation.]"¹¹ (*Butt*, at p. 678.) If there is

action respecting the subject of the action, and tending to render the judgment ineffectual.

"(4) When pecuniary compensation would not afford adequate relief.

"(5) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief.

"(6) Where the restraint is necessary to prevent a multiplicity of judicial proceedings.

"(7) Where the obligation arises from a trust."

The parties apparently agree Code of Civil Procedure section 526, subdivision (7) arguably was applicable in the circumstances of this case if the other requirements for a preliminary injunction were satisfied.

¹¹ Some courts have stated the moving party must show a *reasonable probability* of success on the merits for grant of a preliminary injunction. (See, e.g., *Teamsters Local 856 v. Priceless, LLC* (2003) 112 Cal.App.4th 1500, 1509; *Teachers Ins. & Annuity Assn. v. Furlotti* (1999) 70 Cal.App.4th 1487, 1493; *San Francisco Newspaper Printing Co. v. Superior Court* (1985) 170 Cal.App.3d 438, 442; *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 206; *Continental Baking Co. v. Katz*, *supra*, 68 Cal.2d at p. 528; 6 Witkin, Cal. Procedure (4th ed. 1997) Provisional Remedies, § 349, p. 279.) Although there may be a conflict in authority regarding whether a moving party must show a *reasonable probability* or merely a *reasonable possibility* he or she may prevail on the merits, we

no reasonable likelihood the moving party will prevail on the merits, the trial court must deny a motion for a preliminary injunction. (*Doe v. Wilson* (1997) 57 Cal.App.4th 296, 314; *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443.)

"On a typical appeal from an order granting a preliminary injunction, the question is whether both irreparable harm and the likelihood of prevailing on the merits are established. [Citations.]" (*Pro-Family Advocates v. Gomez* (1996) 46 Cal.App.4th 1674, 1681.) "The law is well settled that the decision to grant a preliminary injunction rests in the sound discretion of the trial court. [Citations.] [¶] A trial court will be found to have abused its discretion only when it has ' "exceeded the bounds of reason or contravened the uncontradicted evidence." ' [Citations.] Further, the burden rests with the party challenging the injunction to make a clear showing of an abuse of discretion. [Citations.]" (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69.)

II

Application of Contractual Lien to Gardner Settlement Proceeds

The Keenans contend the trial court erred by granting Webb's motion for a preliminary injunction because Webb did not show it could prevail on the merits of its claim for a contractual lien for attorney fees on the proceeds of the Gardner settlement.

In support of the preliminary injunction, Webb asserts its "likelihood of success on the merits is prima facie, based upon the face of the contractual lien itself, [its] declaration as to amount and value of the work performed, and the trial court's

need not address that issue because Webb has not made the necessary showing under either standard of proof.

subsequent confirmation of the arbitrator's award"12 Webb's assertion of a contractual lien on the Gardner settlement proceeds is based solely on the language of the Agreement.¹³

The Agreement between Webb and the Keenans applied *only* to specific services to be provided by Webb:

"[Webb] will further prosecute *your claims against [the Trustee] and [Satten]*, for intentional and negligent misrepresentation, breach of fiduciary duty, interference with contract, breach of the covenant of good faith and fair dealing, declaratory relief, and an accounting, *arising out of the negotiation and execution of that settlement agreement between [the Trustee] and [Satten]*, in an action to be filed in the Superior Court for the State of California, County of San Diego, (hereinafter referred to as 'the Action'). This representation includes the investigation, litigation, negotiation and settlement of *those claims*.

"*No other legal services are covered by this agreement.*" (Italics added.)

¹² Webb refers to a new arbitration award confirmed by the trial court. Webb has filed a request for judicial notice to include confirmation of the arbitration award and we grant that request.

¹³ To the extent Webb may assert a lien on noncontractual grounds, the assertion is not supported by California law. "In California, an attorney's lien is created only by contract--either by an express provision in the attorney fee contract [citations] or by implication where the retainer agreement provides that the attorney is to look to the judgment for payment for legal services rendered [citations]." (*Carroll v. Interstate Brands Corp.* (2002) 99 Cal.App.4th 1168, 1172.) Furthermore, for an attorney to obtain a lien on a future recovery, he or she must comply with rule 3-300 of the Rules of Professional Conduct of the State Bar of California, which, inter alia, requires the client's written consent to the lien. (*Fletcher v. Davis* (2004) 33 Cal.4th 61, 71-72.) Also, to the extent Webb argues it has a constructive trust on the proceeds of the Gardner settlement, that constructive trust is dependent on Webb's purported contractual lien under the Agreement. Any cases cited by Webb to the contrary have been effectively overruled by *Fletcher*.

Webb's fees and costs for those specific services were set forth in the Agreement and secured by a contractual lien on any recovery obtained "in connection with [the Keenans'] claims" described in the Agreement:

"By executing this fee agreement, you agree that there is a lien on any recovery obtained in connection with your claims for the amount of the costs and attorneys' fees agreed to herein." (Italics added.)

Under the Agreement any services provided by Webb other than as described, and fees for other services, were *not* covered by the Agreement:

"To the extent that you request [Webb] to perform any legal services not described herein, the compensation to be paid for any related matters that arise out of the attorney-client relationship, not covered by this fee agreement, shall be the subject of a separate agreement and shall not be affected by any payment to [Webb] under this fee agreement."

We interpret a contract "to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) "Where contract language is clear and explicit and does not lead to absurd results, we ascertain intent from the written terms and go no further. [Citations.]" (*Ticor Title Ins. Co. v. Employers Ins. of Wausau* (1995) 40 Cal.App.4th 1699, 1707.) Furthermore, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) "The interpretation of a written instrument, even though it involves what might properly be called questions of fact [citation], is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. [Citations.]" (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) "It is therefore solely a judicial function to

interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence. Accordingly, '[a]n appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of [extrinsic] evidence [citations]' ¹⁴ (*Ibid.*)

Based on our independent review of the language of the Agreement, we conclude the contractual lien granted to Webb by the Keenans applies *only* to a recovery obtained in connection with the Keenans' claims against the Trustee and Satten "*arising out of the negotiation and execution of that settlement agreement*" between the Trustee and Satten. (Italics added.) The express language of the contractual lien set forth in the Agreement stated the Keenans agreed "there is a lien on any recovery obtained in connection with *your claims*" for the amount of Webb's attorney fees and costs provided under the Agreement. Although based on that specific provision alone the phrase "your claims" initially might appear to be ambiguous, that phrase, when read in the context of the entire Agreement (Civ. Code, § 1641), refers to the Keenans' claims against the Trustee and Satten arising out of the negotiation and execution of their settlement agreement and not to any legal malpractice claim they might have against Gardner.

The Agreement's initial use of the phrase "your claims" appears in its description of the legal services to be provided by Webb to the Keenans under the Agreement:

¹⁴ Extrinsic evidence is not admissible to give a contract a meaning to which it is not reasonably susceptible. (*Parsons v. Bristol Development Co.*, *supra*, 62 Cal.2d at p. 865.) In the circumstances of this case, neither party cites any extrinsic evidence to support a meaning to which the Agreement is reasonably susceptible. Therefore, we decide this case based on the plain meaning of the Agreement's language.

"[Webb] will further prosecute *your claims* against [the Trustee] and [Satten] . . . arising out of the negotiation and execution of that settlement agreement between [the Trustee] and [Satten] in an action to be filed in the Superior Court for the State of California, County of San Diego, (hereinafter referred to as 'the Action'). This representation includes the investigation, litigation, negotiation and settlement of *those claims*." (Italics added.)

The Agreement then expressly states "[n]o other legal services are covered by this agreement." It then makes its second use of the phrase "your claims," stating: "[Webb has] provided you with our opinion of *your claims*, based upon available information." (Italics added.) That reference refers to the Keenans' claims against the Trustee and Satten, as described in the initial paragraph (i.e., arising out of the negotiation and execution of the settlement agreement between the Trustee and Satten). The Agreement's third and fourth uses of the phrase "your claims" appear in a paragraph requiring the Keenans to keep Webb advised of their whereabouts and to "actively assist [Webb] in connection with the preparation, presentation and defense of *your claims*. [Webb] in turn will keep you informed regarding the developments in the prosecution of *your claims*." (Italics added.) Again, those references to "your claims" refer to the Keenans' claims against the Trustee and Satten, as described in the initial paragraph (i.e., arising out of the negotiation and execution of the settlement agreement between the Trustee and Satten).

The Agreement's fifth use of the phrase "your claims" appears in the section on attorney fees, costs and expenses, in which it states: "[Webb is] hereby assigned 10% of the gross amount of any recovery in the prosecution of *your claims*." (Italics added.) Again, that reference refers to the Keenans' claims against the Trustee and Satten, as described in the initial paragraph (i.e., arising out of the negotiation and execution of the

settlement agreement between the Trustee and Satten). Also in that section, the Agreement sets forth the sixth use of the phrase "your claims" in the contractual lien provision that is the instant subject of our interpretation: "By executing this fee agreement, you agree that there is a lien on any recovery obtained in connection with *your claims* for the amount of the costs and attorneys' fees agreed to herein." (Italics added.) The only reasonable interpretation of the phrase "your claims," as used in that contractual lien provision, is the same meaning it had in the Agreement's five prior uses of that same phrase. Reading the contractual lien provision, including its phrase "your claims," in the context of the *whole* Agreement, the phrase "your claims" refers to the Keenans' claims against the Trustee and Satten, as described in the initial paragraph (i.e., arising out of the negotiation and execution of the settlement agreement between the Trustee and Satten).¹⁵ The Agreement's use of the phrase "your claims" was, in effect, a defined term (even though not capitalized or otherwise expressly designated as such) and its meaning for purposes of the whole Agreement depended on its initial definition or description in the Agreement. The Agreement's initial use of that phrase stated: "[Webb] will further prosecute *your claims* against [the Trustee] and [Satten] . . . arising out of the negotiation and execution of that settlement agreement between [the Trustee] and [Satten]" Therefore, interpreting the clear and explicit language of the Agreement, we conclude Webb's contractual lien under the Agreement applies *only* to any recovery

¹⁵ Although the Agreement uses the phrase "your claims" six additional times after the contractual lien provision, each of those uses supports, rather than detracts from, our conclusion that the meaning of that phrase is consistent throughout the Agreement.

obtained in connection with the Keenans' claims against the Trustee and Satten arising out of the negotiation and execution of the settlement agreement between the Trustee and Satten and does not apply to any recovery in the Keenans' legal malpractice claim against Gardner.

Webb's contractual lien under the Agreement does not apply to the proceeds from the Gardner settlement. That settlement involved the Keenans' professional negligence claims against Gardner, their former bankruptcy counsel. Webb does not cite, and we are unaware of, any evidence in the appellate record showing the Keenans' professional negligence claims against Gardner had any connection to the Keenans' claims against the Trustee and Satten arising out of the negotiation and execution of the settlement agreement between the Trustee and Satten.

Accordingly, we conclude Webb did not meet its burden to show there is a reasonable possibility it would prevail on the merits of its claim that it had a contractual lien on the proceeds of the Gardner settlement. (*Butt v. State of California, supra*, 4 Cal.4th at pp. 677-678.) "A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim. [Citation.]" (*Id.* at pp. 677-678.) Because our review of the appellate record does not show there is a reasonable possibility Webb will prevail on the merits of its claim, the trial court abused its discretion in granting Webb's motion for a preliminary injunction.¹⁶ (*Ibid.*; *Doe v. Wilson, supra*, 57

¹⁶ Because we dispose of the Keenans' appeal based on this ground, we do not address the merits of their other contentions or Webb's arguments in response.

Cal.App.4th at p. 314; *Common Cause v. Board of Supervisors*, *supra*, 49 Cal.App.4th at p. 443; *IT Corp. v. County of Imperial*, *supra*, 35 Cal.3d at p. 69.)

III

Mootness

Webb argues in its respondent's brief (filed on October 6, 2004), that "upon the trial court's August 26, 2004 confirmation of the arbitrator's award of \$516,434.66, on October 29, 2004, the [Keenans'] appeal of the preliminary injunction will automatically become moot." However, Webb improperly argues in its respondent's brief matters *not* then contained in the record on appeal. (*Kendall v. Barker* (1988) 197 Cal.App.3d 619, 625; *Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 631-632; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2004) ¶¶ 8:171 to 8:173, p. 8-116 (rev. # 1, 2004).) "[D]ocuments not before the trial court cannot be included as part of the record on appeal and thus must be disregarded as beyond the scope of appellate review. [Citations.]" (*Pulver, supra*, at p. 632.)

However, subsequent to the briefing in this appeal Webb filed a Request for Judicial Notice, which we grant, and a Motion to Dismiss the appeal as moot. We take judicial notice of the trial court's August 26, 2004 Order Granting Petition to Confirm Arbitrator's Award, the trial court's December 17, 2004 Right to Attach Order and the Writ of Attachment of the Gardner settlement proceeds, supported by a \$50,000 undertaking required by Code of Civil Procedure section 489.210. Webb contends this appeal should be dismissed as moot because the December 17, 2004 issuance of a writ of

attachment directed to the Gardner settlement funds supersedes the preliminary injunction from which the appeal is taken.

The writ of attachment does not supersede the preliminary injunction. Were the writ of attachment to be vacated, the preliminary injunction would remain in effect. This fact is in effect acknowledged by Webb because it seeks to dismiss the appeal, leaving the preliminary injunction in effect, rather than stipulate to dissolve the preliminary injunction. As Webb candidly admitted at oral argument, it wishes the preliminary injunction to remain in effect as a back-up hold on the Gardner settlement funds in the event the writ of attachment is vacated, perhaps on appellate review of the issuance of the writ of attachment.

We therefore deny Webb's motion to dismiss the appeal because the issue raised in the appeal is not moot.

DISPOSITION

The order is reversed and the matter is remanded to the trial court with directions to enter a new order denying the motion for a preliminary injunction. The Keenans shall recover their costs on appeal.

WE CONCUR:

McDONALD, J.

NARES, Acting P. J.

McINTYRE, J.